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September 29, 1995

Mr. Morris Flexner
U.S. Environmental Protection Agency
Region IV
345 Courtland Street NE
Atlanta, Ga. 30365

RE: Kentucky's "Nondegradation Policy Implementation Methodology", 401 KAR 5:030.

Dear Mr. Flexner:

This letter is intended to provide you with a more detailed statement of the objections of the Kentucky Resources Council, the Cumberland Chapter of the Sierra Club, and a number of other environmental groups in the state to the revision of Kentucky's Water Quality Standards, 401 KAR 5:030, which was submitted for your review on August 11, 1995 by the Kentucky Natural Resources and Environmental Protection Cabinet ("Cabinet"). As we have previously discussed, we believe that the proposed regulation violates both the state policy to "safeguard from pollution the uncontaminated waters of the Commonwealth and to prevent the creation of any new pollution" and the zero discharge mandate of the Clean Water Act, 33 U.S.C. Section 1251, et seq., as well as the recommendations of your agency.

The regulation before you significantly weakens water quality protection within the Commonwealth of Kentucky in two ways. First, it virtually eliminates antidegradation protection for those waters that are currently meeting designated uses. Antidegradation policy is the only part of the Clean Water Act where the regulations are specifically designed to implement a pollution prevention program when a discharger wants to either increase the amount of pollutants it discharges from a point source or create a new point source. For example, if the Kentucky River is currently meeting the designated use for aquatic life from one end of the River to the other but is not suitable for recreation for a portion of the year because of high levels of fecal coliform, the antidegradation regulation, if it is properly implemented, is the only regulation that limits the discharge of other pollutants into the Kentucky

River that would lower that water quality down to the point where it is unsuitable for aquatic life. This regulation is intended to protect existing water quality where that water quality is good. It is not intended to be a regulation that only focuses on pristine waters as does 401 KAR 5:030. An appropriate antidegradation policy must apply to more than 2-3% of a state's river miles. Kentucky's proposed methodology does not.

The principal failure of the Cabinet's approach is that it relies on a stream characterization approach rather than a parameter-by-parameter approach, that it burdens the public or the Cabinet rather than the discharger to establish the stream character, and in the absence of data offers no stream protection beyond protection of designated uses.

The second way that this regulation weakens water quality protection is that its practical effect is to exclude the public from meaningful participation in permitting decisions, contrary to the requirements of 40 CFR 131.12. The public should have a say in permitting decisions and the Clean Water Act intends for the public to have a say. It has been our experience that where the public has participated in permitting decisions the final decision has been more protective of the environment then before the public got involved. When questioned about this feature of the new rule, one Division of Water spokesman replied, "The public always has an opportunity to participate in court".

The state agency has opposed the approach that we have recommended as too burdensome. Yet the Cabinet has not provided actual information concerning how many permits per year request an increase in the amount of pollutants being discharged or how many permits propose to locate at new points of discharge. We believe that the number of permits falling into this category would be approximately 50 per year or less and, in that case, an antidegradation review would not be burdensome for the Cabinet.

We believe that the clearest explanation of how antidegradation should be implemented is set forth in the preamble to the proposed rules for Water Quality Guidance for the Great Lakes System and Correction dated April 16, 1993. See Federal Register, Volume 58, No. 72 beginning at page 20802. In addition, there are a number of other EPA publications that clarify how antidegradation implementation should occur.

We refer you to the following:

> All parameters do <u>not</u> need to be better quality than the States ambient criteria for the water to be deemed a "high-quality water". EPA believes that it is best to apply

> antidegradation on a parameter-by-parameter basis. Otherwise there is potential for a large number of waters not to receive antidegradation protection, which is important to attaining the goals of the Clean Water Act to restore and maintain the integrity of the Nation's waters.
>
> ...Such activities as new discharges or expansion of existing facilities would presumably lower water quality and would not be permissible unless the State conducts a review consistent with the preceding paragraph. In addition, no permit may be issued, without an antidegradation review, to a discharger to high-quality waters with effluent limits greater than actual current loadings if such loadings will cause a lowering of water quality.

"Water Quality Standards Handbook," 2nd Edition, August 1994, pp. 4-7. Emphasis added.

See also:

> EPA's water quality standards regulations require each state to adopt, as part of its water quality standards, an antidegradation policy consistent with 40 CFR 131.12 and to identify the methods that were used for implementing the policy. . . Section 131.12 effectively sets out a three-tiered approach for the protection of water quality. . . . Tier two (Section 131.12(a)(2)) protects the water quality in waters whose quality is better than that necessary to protect "fishable/swimmable" uses of the water body. 40 CFR 131.12(a)(2) requires that certain procedures be followed and certain showing be made before lowering water quality in high quality waters. These showings may be called an "antidegradation review." In no case may water quality in a tier two water body be lowered to the level at which existing uses are impaired. The tier two protection usually is applied on a parameter by parameter basis (called the definitional approach to tier two). This approach is applied on a case-by-case basis so that, if the level of any parameter is better than water quality standards for that water body, then an

> antidegradation review will be performed for any activity that could reduce the level of that parameter.

"Technical Support Document for Water Quality Based Toxics Control," (March 1991), pp. 29-30.

See also:

> High quality waters. High quality waters are water bodies in which, on a parameter by parameter basis, the quality of the waters exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water.

Final Water Quality Guidance for the Great Lakes System; Final Rule. March 23, 1995. 60 FR 15413.

Instead of following the antidegradation implementation approach set out explicitly in the above cited EPA Guidance, the Cabinet has now proposed to modify the antidegradation mandate so that for over 97% of the waters of the Commonwealth there is no antidegradation protection.

Region IV appears to have recognized problems with the Cabinet's approach. Your September 8, 1994 comments contain the following:

> As part of EPA's antidegradation policy, all waters are considered high quality until data is collected that shows otherwise. This method of implementation prevents significant lowering of water quality without an alternatives analysis. Using the method outlined in this regulation and 401 KAR 5:029, waters would be considered "Use Protected" unless significant data proves that the waterbody is high quality. This implementation method appears to present a significant obstacle to classifying a waterbody as high quality and places the burden of proof on the entity that would economically benefit the least by the increasing the level of protection for the waterbody.

With this background, it makes absolutely no sense for the Cabinet to propose an approach to antidegradation that would do nothing more than protect designated uses for over 97% of

Kentucky's waters. Such a proposal simply ensures ongoing intense confrontation over the proper implementation of the Clean Water Act.

During the triennial review process, the Cabinet for Natural Resources and Environmental Protection held several public hearings and a series of regional meetings as various drafts of this regulation appeared. Hundreds of concerned citizens and groups were given an opportunity to express their views. They did so enthusiastically. The public delivered the message that people want stronger, not weaker, environmental protection. Many people expressly requested the parameter-by-parameter approach. The agency, however, chose to ignore the public message. The proposed regulation, which emerged in its final form on the day before it was presented to the legislative subcommittee for approval, does not represent any kind of consensus or compromise, nor is it consistent with the federal mandate.

It is our hope that Region IV, already aware of the significant shortcomings of this policy, will disapprove it and promulgate an appropriate antidegradation policy for the state of Kentucky, one that is consistent with the intent of the federal mandate.

Respectfully submitted,

Hank Graddy

HG/vlj

cc: Tom Fitzgerald
John Hankinson